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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. [redacted] 75

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMIR ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

PETITION OF THE CITY OF NORTH CHICAGO, ET AL., FOR A WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

HAROLD J. TALLETT,
City Attorney of the City of North Chicago, Illinois,
FRANK T. O'BRIEN,
LIONEL A. MINCER,
Chicago, Illinois,
Counsel for Petitioners.

WHAM AND O'BRIEN,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, The City of North Chicago, a municipal corporation, John P. Dromey, Anton Macrowski, Jr., William Orlowski, Peter Czajkowski, Benjamin Newnham, Leslie Calder, Joseph McKillen, Louis Rose, Casimir Zdanowicz and Walter Koziol,* pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of

*Individual petitioners are present officials of the City of North Chicago, none of whom held office at the time of the construction of the sewer involved in the special assessment proceeding.

Appeals for the Seventh Circuit, entered on appeal by respondent, The Maccabees, a corporation, from a decree of the District Court of the United States for the Northern District of Illinois.

Jurisdictional Statement.

The judgment of the Circuit Court of Appeals was rendered on January 13, 1942 (R. 307), and rehearing was denied on February 13, 1942 (R. 308). The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, U. S. Code, Title 28, Section 347, as amended. See also Rule 38(5)(b) of this Court.

No question of the validity of any statute is involved. Various provisions of the Local Improvements Act of Illinois are material; the statute is summarized and its pertinent sections quoted in full in the Appendix (*infra*, page 23).

Questions Presented.

The principal question presented by this petition is, whether it is proper for a Federal court to direct the issuance of a mandatory injunction, requiring a municipal corporation and its officials to comply with a state statute, providing for local improvements by special assessment, in a case which is in the Federal court only by reason of diversity of citizenship, where similar relief, if warranted, could have been obtained in a state court by mandamus, but not by any form of equitable relief.

Subsidiary questions are the adequacy of the bill of complaint to state a case for equitable relief on grounds of fraud, conspiracy, or accounting.

Statement of the Case.

The Maccabees, a Michigan corporation, plaintiff in the District Court and hereinafter referred to as "plaintiff," filed a bill in equity in that Court on August 25, 1934, claiming to be the holder of certain temporary or interim special assessment bonds issued by the City of North Chicago in connection with the construction of a sewer. The defendants to the original complaint were the City, various individuals then holding office in the City administration, the contractor who built the sewer and the surety on the contractor's bond. The individual petitioners herein were not identified with the City administration at the time of the construction of the sewer and the delivery of the interim bonds to the contractor, plaintiff's assignor. Equitable relief, including a mandatory injunction and an accounting, was prayed. Motions to dismiss the bill were filed by the defendants and were sustained by the District Court. The Circuit Court of Appeals reversed the decree of the District Court.

The material facts charged in the complaint are as follows:

> In February, 1924 the City of North Chicago adopted an ordinance for construction of a sewer to be paid for by special assessment (R. 5, 6, 30). In March the same year, the City filed special assessment proceeding No. 162 in the County Court of Lake County (R. 7). The Court confirmed the assessment. In June of the same year, the bid of defendant Santry was accepted and a contract executed by him and the City for the construction of the sewer (R. 7, 36). Santry and defendant, Maryland Casualty Company, as surety, furnished a completion bond to the City in the penal sum of $16,000.00 (R. 8, 41). Construction was commenced and was paid for in assessment bonds in installments during July and August of the same year. The work was completed August 27 (R. 9). Plaintiff does not know the exact number of bonds delivered to Santry, but all of the bonds were sold to Hanchett Bond Com-

pany. October 1, 1924, plaintiff purchased $10,000.00 of said bonds from that company at par, and is the owner and holder thereof (R. 10).

Santry defaulted in the performance of his contract, and did not construct the sewer in accordance with the ordinance in that the flow line is wholly different from that required (R. 10, 11). Plaintiff avers on information and belief that the Board of Local Improvements and the City Engineer received complaints from property owners before the last bonds had been delivered to the defaulting contractor (R. 11); that under Sec. 84 of the Illinois Local Improvements Act it was the duty of the Board to certify to the County Court within thirty days after August 27, 1924, whether or not the improvement had been constructed in accordance with the contract and the ordinance (R. 12), but that no such certificate has ever been filed (R. 14).

Changes have been made in the sewer by the installation of pumps and by connection with the sewer system of the City of Waukegan, whereby it has been made to function as a force flow rather than a gravity flow sewer (R. 16). In 1930 plaintiff commenced to negotiate with the City and the Casualty Company in an effort to have the special assessment proceedings completed (R. 17). Plaintiff avers that at the suggestion of the then acting City Attorney, and on his representation that a certificate would be filed if the County Court so ordered, plaintiff, on May 31, 1931, filed a petition (still pending) in the County Court assessment proceedings praying for an order requiring the Board to file a certificate of cost and completion. An order was entered by the County Court pursuant to the petition, but the Board filed no certificate. Plaintiff then sought to have the members of the Board held in contempt but the County Judge set aside the order requiring the Board to file the certificate (R. 17, 18). The County Judge is an official elected by the voters of Lake County, including those whose property was assessed (R. 18). Plaintiff avers that the negotiations for settlement were conducted for the purpose of inducing plaintiff to believe that the matter might be

disposed of, until such time as its rights had been barred by limitation (R. 19).

Under Section 90 of the Local Improvements Act, the holders of special assessment bonds have no claim against the City except from collections made (R. 19), and while said Section provides relief by way of mandamus or injunction, plaintiff has no remedy at law, and no certificate will be filed unless the Federal Court compels the filing thereof (R. 20). Santry is wholly insolvent and since the County Court must find that the sewer does not conform to the contract and the ordinance, plaintiff's bonds are worthless and it will be required to surrender the same (R. 21, 22).

None of the installments of principal of the assessment have ever been collected except approximately $1,699.50 paid on initial installments. Special assessment collections under Illinois law constitute a trust fund for bondholders. Plaintiff avers that the records of the Board and of the City are inadequate for a trust accounting, but it appears that no collections were made after October 2, 1925. Plaintiff has received $868.25 on account of interest, but has received no payment of principal. Payments made to plaintiff were fraudulent in that they should have been made to all bondholders pro rata. Accordingly an accounting is necessary (R. 22, 26, 27).

The prayers are:

1. For an injunction directing the individual defendants to file a certificate of cost and completion in the County Court of Lake County;

2. For judgment against the surety in the amount of damage suffered by plaintiff, and for payment by the surety of such sums as are necessary to complete the sewer;

3. For an accounting by the City and for judgment against it for collections found to have been unlawfully diverted;

4. For retention of jurisdiction until the sewer has been completed, the County Court has approved the same, and new bonds have been issued to plaintiff;

5. For general relief (R. 28, 29).

Answers were filed in October, 1934 (R. 47, 52), and the cause was subsequently set for trial January 5, 1937, but was continued generally (R. 57, 58). The plaintiff amended the bill by making additional persons, including the individual petitioners, parties defendant (R. 44, 63, 71, 81). The cause was twice again set for trial and stricken from the call (R. 70, 80, 85). In May, 1940, motions were filed by the defendants for judgment on the pleadings (R. 87, 88). Briefs were filed (R. 102-159) and the District Court entered an order sustaining the defendants' motions (R. 159).

On September 20, 1940, the Court vacated its order for judgment on the pleadings (R. 194) and heard oral arguments (R. 205-279), after which the Court granted all defendants leave to withdraw their answers and to file motions to dismiss (R. 282). The motions were thereupon allowed and the order allowing the same was the order appealed from. On January 13, 1942, the Circuit Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and remanded the case (R. 307).

Reasons for Granting the Writ.

1. A conflict exists between the decision of the Circuit Court of Appeals for the Seventh Circuit in this case and the Circuit Court of Appeals for the Fifth Circuit in the case of *Fineran* v. *Bailey*, 2 Fed. (2d) 363, on the question whether or not a mandatory injunction should be issued as a substitute for, or in lieu of, a writ of mandamus. The Fifth Circuit held in the case last mentioned that it was improper to issue a mandatory injunction under such circumstances, but the Seventh Circuit in the instant case holds by necessary implication that this practice is proper.

2. The Circuit Court of Appeals has decided an important question of local law in a way conflicting with the applicable local decisions, in holding that a non-resident owner of Illinois local improvement bonds was not limited, in the Federal court, to such remedies as would have been available in the state court to a resident owner of such

bonds, but could obtain equitable relief not permitted by the state decisions. The question is important because such a holding will tend to increase greatly the volume of Federal court litigation by making the Federal forum more attractive to owners of such bonds.

3. The Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court:

(a) In holding that, in a diversity case, the Federal District Courts can and should grant relief of a kind which the state courts cannot and would not grant;

(b) In holding that, in a diversity case, the Federal District Court should undertake to coerce a municipality and its officers to perform acts required by state law, when such coercion could have been, but was not, sought through a mandamus proceeding in the state courts;

(c) In holding that the Federal District Court committed an abuse of discretion in denying relief in equity, although the state court legal remedy was adequate, and although the granting of relief would involve a conflict between the Federal courts and the State;

(d) In failing to follow the substantive law of Illinois (see *Pecheur Lozenge Co., Inc.* v. *National Candy Co., Inc.*, decided March 30, 1942, not yet reported; No. 648, October term, 1941), which fixes and measures the rights of holders of local improvement bonds, irrespective of the forum chosen for the enforcement of those rights;

the Federal question being an important one because it affects the relations between the Federal courts and the courts of the State of Illinois (see *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 106-7; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45, 49).

4. The Circuit Court of Appeals departed from the usual course of judicial proceedings:

(a) By predicating its decision in substantial part upon matter not in the record;

(b) By failing to follow its decision in the prior case of *Tolman* v. *Clark County Drainage District*,

62 Fed. (2d) 226, cert. den., 289 U. S. 724, without assigning any reason whatsoever for such failure, notwithstanding that the *Tolman* case was applicable and controlling;

thus calling for an exercise of this Court's power of supervision.

And in support of this, their petition, petitioners submit the brief which follows.

HAROLD J. TALLETT,
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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals appears in the Record filed herewith at pages 301-306, and is reported in 125 Fed. (2d) page 330. Judge Kerner wrote the opinion; Judges Sparks and Minton concurred.

Jurisdictional Statement.

The jurisdictional statement appears in the petition, page 2 above.

Statement of the Case.

The statement of the case is set forth at page 3 and following above, and is therefore not repeated here, except that petitioners desire to emphasize the fact that this case is in the Federal courts solely on grounds of diversity of citizenship.

Summary of Argument.

The Circuit Court of Appeals should have denied equitable relief to plaintiff, because:

1. Granting such relief will inevitably produce a conflict with the State of Illinois, its courts and subordinate agencies, and it is unseemly and improper for Federal courts to attempt to coerce state agencies about a matter of purely state concern.

2. The non-existance of a right to equitable relief was a qualification of plaintiff's substantive right, and the Federal court should have applied the law of Illinois. The accident of diversity of citizenship should not have been allowed to produce a result in the Federal court different from that which would have been obtained in the state courts.

3. Even if plaintiff's right was purely procedural and not substantive, as argued under the preceding division hereof, the case was not one of which the Federal courts had general equity jurisdiction, apart from Illinois statute; and as a consequence, the Federal equity court could not act in the matter. Bases of jurisdiction assigned by the Circuit Court of Appeals were erroneous and unfounded.

ARGUMENT.

I.

The Withholding by the District Court of Any Relief Upon Plaintiff's Complaint Was a Proper Exercise of Discretion, Which the Circuit Court of Appeals Should Have Sustained.

It is not material in the argument of this point whether or not the District Court, in equity, had jurisdiction of the subject matter of the plaintiff's bill of complaint. Assuming jurisdiction existed, the District Court was right in declining to exercise it. The action of the District Court in the matter was in conformity with the cautionary observation of this Court in *Pennsylvania* v. *Williams,* 294 U. S. 176, 185, that courts of equity should exercise their discretionary power with proper regard to the rightful independence of the state governments in carrying out their own domestic policies. See also *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 197; *Railroad Commission* v. *Pullman Company,* 312 U. S. 496; *Kelleam* v. *Maryland Casualty Company,* 312 U. S. 377, 382. The District Court was apparently unwilling to embark upon a course of litigation which would have led to "unseemly and disastrous conflicts in the administration of our dual judicial system." (*Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 195.) The action of the Circuit Court of Appeals in reversing this proper and suitable holding by the District Judge was error requiring review by this Court.

It was apparent to the District Judge that the granting of a mandatory injunction against petitioners and the other defendants would not end the case; the plaintiff also asked that the District Court retain jurisdiction of the

cause until the State law had been complied with (R. 29, Prayer No. 4). The District Judge indicated apprehension that, even if a mandatory injunction was granted after full hearing, the District Court would have to supervise all the further steps in the special assessment proceeding (see R. 246). It would be entirely possible for the plaintiff, after obtaining a mandatory injunction, to make repeated calls on the District Court, on every occasion when the County Court did not act in strict conformity with plaintiff's views of its rights. Thus, the case as made by the complaint was replete with possibilities of open hostility between the District Judge and the Judge of the County Court. Cf. *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118, 135. This is precisely the sort of thing which this Court in the cases above cited has deplored, and has urged the District Courts to avoid. The reversal of the District Court by the Circuit Court of Appeals operates in defiance of those authorities, and is especially unfortunate in view of this same Court's decision in *Tolman* v. *Clark County*, 62 Fed. (2d) 226, cert. den. 289 U. S. 724.

When the bill of complaint was filed in the District Court, when the District Court dismissed the complaint, and even at the present day, there is pending in the County Court of Lake County the very special assessment proceeding in which plaintiff's rights must ultimately be determined, and to which the proceedings in the District Court were directed. Moreover, there was pending in that case (R. 17), a petition by this same plaintiff for a rule on some of the defendants to file the certificate of cost and completion, which is the objective of the mandatory injunction herein sought.* The situation was similar in all essential respects to that presented by *Kelleam* v. *Maryland Casualty Company*, 312 U. S. 377, wherein this Court held

* Plaintiff failed to appeal from the action of the County Court which it now challenges, and failed to seek a mandamus in the state courts.

that the Federal District Court should not have asserted its authority. It is submitted that the District Court was right in declining to act in the matter, and that the Circuit Court of Appeals was wrong in failing to uphold the District Court.

The scrupulous regard for the rightful independence of the state governments, which is one of the basic principles of Federal jurisprudence, should have operated to dissuade the Circuit Court of Appeals from directing that coercive action be taken against these petitioners, a municipal corporation and its present officials, in a case in which the state court remedies were adequate to protect the plaintiff's rights. In *Pennsylvania* v. *Williams,* 294 U. S. 176, at page 185, this Court pointed out how strong were the reasons for withholding equitable relief in the Federal courts where the exercise of jurisdiction would involve an unnecessary interference by injunction with the lawful action of state officers. There is no doubt that if equivalent relief can be procured in the state courts, a Federal injunction should not be resorted to. See cases cited *supra;* also *Keokuk Bridge Co.* v. *Salm,* 258 U. S. 122, 124. Likewise, this Court has held that the state court remedies should be pursued, at least in the first instance, where Federal court action would require interference by injunction with the fiscal operations of a state (*Matthews* v. *Rodgers,* 284 U. S. 521, 525). This Court has said that caution and reluctance should characterize the acts of Federal courts in interfering by injunction with the lawful operations of state officers (*Hawks* v. *Hamill,* 288 U. S. 52, 60, 61), especially where the rights are strictly local and jurisdiction has no basis except the accident of residence; and the fact that there is an adequate legal remedy in the state courts should be a ground for non-action by the Federal court in a case in which the Federal court, in order to give relief, must exert coercion upon state officials. See *Arkansas Building & Loan Association* v. *Madden,*

175 U. S. 269, 273; Cf. *Fenner* v. *Boykin*, 271 U. S. 240, 242, 243; *Mass. Grange* v. *Benton*, 272 U. S. 525, 527; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681, 684, 690, 691.

The proceedings under the Illinois Local Improvements Act are part of the revenue system of the State. The State of Illinois is directly concerned with the validity and effectiveness of the special assessment procedure. When the Circuit Court of Appeals orders the District Court to grant relief by way of compelling the municipal officials to take steps in a special assessment proceeding, that Court is interfering with the revenue power of the State of Illinois—one of the most important of the attributes of sovereignty.

Such interference on the part of the Federal court was entirely unnecessary; if plaintiff had a valid claim, the state law was adequate to give relief and thus protect the private right. The state courts could give all warranted relief in a mandamus proceeding (*Conway* v. *City of Chicago*, 237 Ill. 128, 135). The policy of Congress in such a case has been expressed by the 1937 amendment to Section 24 of the Judicial Code (Title 28, U. S. Code, Section 41(1), expressly abolishing the jurisdiction of the District courts over suits to enjoin, suspend or restrain the levy, collection or assessment of any state tax, where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state. It is not here suggested that this statute is controlling; the statute was passed after the bill of complaint in the case at bar was filed, and the statute provided that it should not affect any suit commenced prior to its enactment. Nevertheless, the statute does indicate the Congressional policy of non-interference with the fiscal rules and practices of the states, which policy the Circuit Court of Appeals by its opinion herein has utterly disregarded.

II.

In View of the Nature of Illinois Local Improvement Bonds, the Remedy of Bondholders Is a Part of the Substantive Right, So That the Federal Court Was Bound to Conform to the Illinois Law in Denying Equitable Relief.

It is plain that if this suit had been instituted in an Illinois state court, such court could not have granted relief in equity. Local improvement bonds, under the law of Illinois, are instruments of an unusual character. They are not general obligations of the city nor of any of its subdivisions, but are promises to pay only out of a special and particular fund derived from the proceeds of the collection of the special assessment. Illinois Local Improvement Act, Sec. 90, quoted *infra*, appendix, page 28; *City of Chicago* v. *Brede*, 218 Ill. 528, 536; *Morrison* v. *Austin State Bank*, 213 Ill. 472, 487; Cf. *Moore* v. *City of Nampa*, 276 U. S. 536. The remedy of a bondholder desiring to have a special assessment levied and collected is, in the Illinois practice, by mandamus (*Conway* v. *City of Chicago*, 237 Ill. 128, 135). The wording of section 90 of the statute (Appendix, page 29, *infra*) that the bondholders shall have relief "by way of mandamus or injunction" was the same when the *Conway* case was decided as it is now.

In the practice of Illinois, mandamus and injunction are not correlative remedies, and rights to both remedies cannot co-exist in the same case (*Fletcher* v. *Tuttle*, 151 Ill. 41, 59), the remedy by mandamus being proper only in a law action, and the remedy by injunction being proper only in a case of equitable cognizance. In Illinois, the distinction between law and equity has not to this day been abolished (*Frank* v. *Salomon*, 376 Ill. 439, 444).

That a mandatory injunction would not have been granted by an Illinois court is a necessary conclusion from

the decisions of the Supreme Court of Illinois in *White* v. *City of Ottawa*, 318 Ill. 463, 473, and *Des Plaines Foundry Co.* v. *City of Des Plaines*, 335 Ill. 213, 216. In both of these cases, the Supreme Court of Illinois held that the Local Improvements Act, as amended, abolished, by implication, the jurisdiction of equity over matters of local improvements, and that the jurisdiction of the County court over matters of local improvements was exclusive. Petitioners do not here contend that plaintiff was without a remedy by mandamus in a proper state court, if the facts justified such relief; but petitioners do maintain that the mandatory injunction as a substitute or alternate for a writ of mandamus is not available under Illinois law, and that a mandatory injunction is prohibited in Illinois in any case in which relief by mandamus is available. It was so held by the Supreme Court of Illinois in *Lyle* v. *City of Chicago*, 357 Ill. 41, 45, where the Court said:

> "We consider the rule to be well established in Illinois, that if relief is available to a litigant through mandamus, he must pursue that remedy, and that in such case equity has no jurisdiction."

Thus, except in a case where the Court is asked to administer a trust fund, consisting of collected proceeds of a properly completed special assessment (*Rothschild* v. *Village of Calumet Park*, 350 Ill. 330), it is the settled law of Illinois that the Local Improvements Act has abolished equity jurisdiction over special assessments.

It is not open to question that the Federal courts must, in matters of substantive law, follow the state rules, even though the Federal court proceedings are in equity. *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103. The rules of decision of the state courts are, in such cases, laws of the state which the Federal courts are obliged to follow. *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 236. When the plaintiff's rights are predicated on state law,

it is improper to have one rule of state law in the state courts and another rule of state law in the Federal courts, and the state decisions as to the construction and effect of state statutes are binding on the Federal courts. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 178; see also *Moore* v. *Illinois Cent. R. R. Co.*, 312 U. S. 630, 634. Where, as here, the Federal jurisdiction rests entirely on diversity of citizenship, the reasons impelling adherence to the state court decisions are more pressing, even though the acts of Congress do not require such adherence. The accident of Federal jurisdiction should not be permitted to disturb the equal administration of justice in coordinate courts, sitting side by side. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496.*

The remedy given by the law of Illinois for the enforcement of the rights of a specal assessment bondholder is a part of that right. Indeed, it may be said that the remedy and the right are co-extensive; in other words, that the right consists of nothing but the remedy. A special assessment bondholder, under Illinois law, has no direct right to receive any sum of money from anyone,** and is not the promisee of any unqualified promise. His only right is to have the special assessment confirmed and collected, so that the proceeds thereof may be distributed to him along with all other holders of bonds of the same series. Plaintiff was charged with notice of, and bound by, the Illinois statute pursuant to which the bonds were issued (*Kersch Lake Drainage Dist.* v. *Johnson*, 309 U. S. 485, 491). It is impossible to state the bondholder's substantive right except in terms of a remedy. Therefore, although the right of the bondholder has a procedural aspect, it is not an adjective right, but is one which so far marks, limits and defines that which the bondholder has,

* See Frankfurter, Judicial Powers of Federal and State Courts, 13 Cornell L. Quar. 499, 526; Warren, Federal and State Court Interference, 43 Harvard L. Rev. 345, 347.

** See citations of authority at page 15, *supra*.

that it is itself part and parcel of the substantive right. Thus, the non-availability of the remedy by mandatory injunction in equity is a part of the plaintiff's substantive right, just as truly as was the rule of burden of proof in the case of *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208. The only difference is that in the *Dunlap* case, the procedural rule of burden of proof operated as an assurance in favor of the title of the owner of land, whereas in our case the absence of the equitable remedy is a limitation upon the title of the bondholder.

The Circuit Court of Appeals in its opinion herein (R. 304) speaks of the propriety of protecting the "state created substantive right." But under the authorities herein cited, the right, by definition, included the remedy, and the Circuit Court of Appeals erred in disregarding the state inhibition against equitable relief.

III.

The Case Made by the Bill of Complaint Is Not One Which Lies Within the Jurisdiction of the Federal Court Sitting in Equity.

If the disability of the plaintiff to obtain a mandatory injunction in the Illinois courts to coerce compliance with the Illinois statute was a matter of substantive law, we have in the preceding division hereof shown that the lower court erred in not following the Illinois law. If, on the other hand, the Illinois state rule was merely procedural, the same conclusion follows.

The Illinois statutory provision that a bondholder may have relief by "mandamus or injunction" (*infra*, page 29), can have no effect upon the authority of the Federal court to give relief in the matter. If what the statute confers is merely a remedy, such statute cannot affect the procedure in the Federal court (*Pusey & Jones Co.* v.

Hanssen, 261 U. S. 491, 499). No remedial right to proceed in a Federal court can be enlarged by a state statute (*id.*, at page 497). The Circuit Court of Appeals, in its opinion herein, professed to follow these principles. The Court went so far as to say that the mere existence of an unsatisfied statutory right was not important, but that it was "the manner of defendants' disregard of these alleged rights which prompts the plaintiff to seek the aid of a Federal court of equity in putting to an end the defendants' alleged conspiracy to cheat and defraud" (R. 304).

From this observation, it appears that the Circuit Court of Appeals read into the plaintiff's bill of complaint allegations which were not there. An examination of the complaint would show that no conspiracy was charged, and that no fraud was properly alleged. A number of acts were charged to have been done fraudulently and wrongfully,* but these epithetical characterizations were mere conclusions, not admitted by the motions to dismiss, and the acts so characterized were nothing more than breaches of alleged statutory duties. Such words, even as qualifying adjectives to more specific charges, are not grounds of equity jurisdiction unless the transactions to which they refer are remediable in equity (*Van Weel* v. *Winston*, 115 U. S. 228, 237); and frequent repetition does not add force (*Ambler* v. *Choteau*, 107 U. S. 586, 591). As this Court said in the case last cited, words like "fraud" and conspiracy" have no more effect than other words of un-

* R. 12: The former city engineer "fraudulently and wrongfully" submitted estimates to the Board of Local Improvements; that Board "fraudulently and wrongfully" voted unanimously to approve the estimates; bonds were "wrongfully and fraudulently" issued to the contractor. R. 14: The Board of Local Improvements, the (then) members thereof, and the (then) city engineer "fraudulently and wrongfully" refuse to file certificate of cost and completion. R. 15: Board of Local Improvements "fraudulently and wrongfully" failed and still fails and refuses to complete the sewer. R. 19: Negotiations in 1931 and up to filing of complaint were "not conducted in good faith" by the former city officials. R. 24, 25: City has "wrongfully and fraudulently" failed to bring action upon surety bond. R. 27: Payment of $358.80 on interest coupons and certain sums out of $1,699.50 collected as principal assessments was "wrongful and fraudulent."

pleasant signification. The Supreme Court of Illinois said in *Doose* v. *Doose,* 300 Ill. 134, 139, that such words are "mere vituperation."

The lower court's references in the opinion (R. 305) to "a fraud on the County Court" and the "abandoned County Court proceeding," are further illustrations of the fact that the court went outside the allegations of the complaint, in order to sustain the claim of Federal equity jurisdiction. Nothing in the complaint avers that the County Court proceedings were abandoned; quite on the contrary, it is expressly alleged that such proceedings were still pending (R. 17). Similarly, it is not even suggested in the complaint that the County Court was defrauded, or in any manner imposed on; the allegations dealing with this subject are that the County Judge in refusing to enforce by contempt process his order directing that the certificate of completion be filed, and in vacating the latter order, was actuated by considerations of political expediency (R. 18, lines 14-31).

The allegation that the former City Attorney suggested that plaintiff file a petition in the County Court, and represented that the City officials would comply with such order as that court might make (R. 17), even when coupled with the allegation that some unspecified negotiations between the plaintiff and the former officials of the City "were not conducted in good faith" (R. 19), utterly fail to sustain the lower court's observation that the City and its former officials had "no intention of being amenable to any adverse decree that the [County] Court might issue" (R. 305).

We, therefore, insist that the only cause of action properly alleged was that which sought to compel the filing by the defendants of the certificate of cost and completion in the County Court. Thus the question becomes: was the Federal equity court competent to exert the desired coercion through the medium of a mandatory injunction?

It is not claimed now or heretofore that the Federal court had power to issue a writ of mandamus in this or in any similar case. The Circuit Court of Appeals seemed to think that the absence of any legal remedy in the Federal courts was a ground for equitable action, but in this the Court erred. The mere absence of a legal remedy in the Federal courts is not, in and of itself, a ground for the exercise of equity jurisdiction by those courts. *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681, 690; *Di Giovanni* v. *Camden Insurance Co.*, 296 U. S. 64, 70; *Atlas Insurance Co.* v. *Southern, Inc.*, 306 U. S. 563, 569, 570. It has been held in the Fifth Circuit that it is improper for a Federal court to issue a mandatory injunction as a substitute for a writ of mandamus (*Fineran* v. *Bailey*, 2 Fed. (2d) 363).

We have, therefore, a case where a claimed right is created by state law, and the question is, shall a Federal court of equity enforce such right although an Illinois equity court would not? A decisive answer is supplied by *Ewing* v. *City of St. Louis*, 5 Wall. 413, 419, where this Court said:

> "The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former."

Cf. *Craig* v. *Leitensdorfer*, 123 U. S. 189, 209.

Parties have no right of access to Federal equity courts unless their matter is one of an equitable nature (*Atlas Ins. Co.* v. *Southern, Inc.*, 306 U. S. 563, 571). There is nothing about plaintiff's substantive right which is of an inherently equitable character. Coercion of public officials to perform their public duty is not one of the recognized heads of equity jurisdiction. *Carlton* v. *Salem*, 103 Mass. 141, 143; *Mann* v. *Mercer County Ct.*, 58 W. Va. 651, 655, 656; 52 S. E. 776, 777; *Franklin Tp.* v. *Crane*, 80 N. J. Eq. 509, 85 Atl. 408; *Bistor* v. *Board of Assessors*, 346 Ill. 362,

369, 373; *Hughes* v. *State Board of Health,* 345 Mo. 995, 137 S. W. (2d) 523.

The state statute under which plaintiff's rights were claimed had nothing to do with the general principles of equity, nor with the Federal equity jurisdiction, and if the state courts in equity were not in a position to grant relief to plaintiff, the same disability attached to the Federal court (*Gorny* v. *Orphans' Board,* a decision of the Seventh Circuit, 93 Fed. (2d) 107, 110, cert. den. 304 U. S. 559; reh. den. 305 U. S. 576; Cf. *Sutton* v. *English,* 246 U. S. 199, 205).

Nor was any case cognizable in a Federal court made by the accounting prayer or the allegations in regard thereto. It appears from the complaint that on this branch of the case, the amount involved was less than $3,000.00 and was in fact not over $1,699.50 (R. 26). This specific allegation obviously controls the general assertion that the amount in controversy exceeded $3,000.00 (R. 3). *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 86, and see *Clark* v. *Gray,* 306 U. S. 583, 589, 590.

It is respectfully submitted that the writ of certiorari should issue as hereinabove prayed.

Respectfully submitted,

HAROLD J. TALLETT,
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WHAM AND O'BRIEN,
Of Counsel.

APPENDIX.

SYNOPSIS OF ILLINOIS LOCAL IMPROVEMENTS ACT.

The Illinois statute concerning local improvements, known as the Act of June 14, 1897, was approved that date and has been in force since July 1, 1897. The statute has been amended from time to time and was codified as a part of the Revised Cities and Villages Act of 1941 (Chapter 24, *Illinois Revised Statutes*, 1941, Sections 84-1 to 84-99). The pertinent provisions in the statute in force at the time of the issuance of the interim bonds held by plaintiff are found in Chapter 24, *Illinois Revised Statutes*, 1923, Article IX, Sections 1-99, paragraphs 122-232. With the exception of Sections 84 and 90, which are set forth below in full, the provisions of the Act may be paraphrased as follows:

SEC. 4, par. 125. Cities and villages are empowered to make local improvements by special assessment of contiguous property or by general taxation.

SEC. 5, par. 126. No ordinance for a local improvement shall be considered by the City Council until it is recommended by the Board of Local Improvements.

SEC. 6, par. 127. The constitution of the Board of Local Improvements depends upon the size of the city or village.

SEC. 7, par. 129. Before a local improvement may be undertaken, a proceeding is started before the Board of Local Improvements either by the Board itself or by an outside agency. A hearing is held after due notice to all interested parties. There is an estimate of total cost and of the amount charged to the public generally.

SEC. 8, par. 130. After hearing, if the project is approved by the Board, an ordinance is prepared and submitted to the City Council.

SEC. 9, par. 131. With the ordinance there must be presented to the City Council a recommendation by the Board which shall be prima facie evidence that all conditions have been complied with.

SEC. 10, par. 132. An estimate of the cost is filed with the ordinance and recommendation.

SEC. 11, par. 133. The ordinance is published under certain conditions.

SECS. 36, 37, pars. 161, 162. Upon adoption of the ordinance, the officers specified therein must file a petition in a court of record in the county where the proposed improvement lies.* With the petition is the ordinance, the recommendation of the Board of Local Improvements, the estimate of costs, etc.

SECS. 38-41, pars. 163-166. If the project is to be paid for by special assessment and the cost apportioned as between the property to be assessed and the public generally, the assessment roll giving the details thereof shall be filed and due notice given.

SEC. 42, par. 167. The assessments may be divided into installments bearing interest and bonds issued in anticipation of the collection of such installments.

SECS. 46-49, pars. 172-175. Any person interested in any real estate assessed may object. The court reviews the assessment roll and conducts a hearing of objections. There may be a trial by jury.

SEC. 51, par. 177. The trial before the court takes place as quickly as possible and is given precedence over all other matters.

SEC. 52, par. 178. And the court is authorized to modify, alter, or confirm the assessment and make all orders that may be necessary.

SECS. 55, 56, pars. 181, 182. After the hearing, the court enters its order of confirmation of the assess-

* In the case at bar the proceeding was filed in the County Court of Lake County where it is still pending.

ment. Such judgment is final and constitutes a lien on the several properties, and is not appealable. The municipality may sell the lien and the purchaser may realize upon it.

SECS. 61, 62, 63, pars. 187-190. The assessment then becomes due.

SECS. 73, 74, pars. 201, 202. Bids are taken for the contract and the contract is let. It is provided that no person taking a contract may look to the city except upon the collection of the special assessment provided for, even though the special assessment cannot be collected.

SECS. 75, 76, pars. 203, 204. The contract is let within ninety days after the term of court to which the judgment of confirmation was entered. Due notice must be given as provided in the statute.

SECS. 76a-79, pars. 205-209. The successful bidder must furnish a bond to the extent of one-third of the bid. The bond provides for the faithful performance of the work according to the plans and specifications, and that the contractor will promptly pay all debts incurred by the contractor in the prosecution of the work, including those for labor and material. Suit may be brought on the bond in case of default to pay those debts in the name of the City, or by any party interested. The Board of Local Improvements then considers the contract and after hearing, awards it to the successful bidder.

SEC. 82, par. 212. In the event the contractor does not complete the job, the contract may be relet by the Board of Local Improvements.

SEC. 83, par. 213. The Board of Local Improvements supervises the execution of the work, and it is provided the work must be done under the direction and to the satisfaction of the Board. All contracts must contain a provision to that effect; and in no case, except as otherwise provided in the ordinance or the judgment of the court, may the Board or municipality or any officer thereof be liable for any portion of the expenses or any delinquency of persons or property

assessed. It is provided that the acceptance by the Board of any improvement may be conclusive in the proceeding to make said assessment and in all proceedings to collect it or the installments, that the work has been performed substantially in accord with the ordinance. But if any property owner is injured, he may recover the amount in an action against the municipality making the improvement.

SEC. 84, par. 214. Within thirty (30) days after the final completion and acceptance of the work, as hereinbefore provided, the board of local improvements shall cause the cost thereof, including the cost of engineering services, to be certified in writing to the court in which said assessment was confirmed, together with an amount estimated by the board to be required to pay the accruing interest on bonds or vouchers issued to anticipate collection and thereupon, if the total amount assessed for said improvement upon the public and private property exceeds the costs of the same, all of said excess, excepting the amount required to pay such interest as herein provided for, shall be abated and the judgment reduced proportionately to the public and private property owners and shall be credited pro rata upon the respective assessments for said improvements under the direction of the court, and, in case the assessment is collectible in installments, such reduction shall be made so that all installments shall be equal in amount, except that all fractional amounts shall be added to the first installment so as to leave the remaining installments in the aggregate equal in amount and each a multiple of one hundred dollars ($100). If prior to the entry of the order abating and reducing said assessment the same shall have been certified for collection pursuant to the provisions of section 61 of this Act as herein amended, and any of the installments of such assessments so certified for collection have become due and payable, the reduction and abatement above referred to shall be made pro rata upon the other installments; the intent and meaning hereof being that no property owner shall be required to pay to the collector a greater amount than his proportionate share of the

cost of said work and of the interest that may accrue thereon. In every assessment proceeding in which the assessment shall be divided into installments it shall also be the duty of the board of local improvements to state in said certificate whether or not the said improvement conforms substantially to the requirements of the original ordinance for the construction of the improvement, and to make an application to said court to consider and determine whether or not the facts stated in said certificate are true; and thereupon the court shall, upon such application, fix a time and place for hearing upon the said petition, and shall enter the same of record, such time to be not less than fifteen (15) days after the filing of such certificate and application. Public notice shall be given of the time and place fixed for such hearing by posting and publishing in a newspaper, in the same manner and for the same period as provided in this Act for publishing notice of application for the confirmation of the original assessment, the posting and publication of such notice to be not less than fifteen (15) days before the day fixed by such order for such hearing. At the time and place fixed by such notice, or at any time thereafter, the court shall proceed to hear said application and any objections which may be filed thereto within the time fixed in such order, and upon such hearing the said certificate of the board of local improvements shall be prima facie evidence that the matters and things stated are true, but if any part thereof are controverted by objections duly filed upon such petition, the court shall hear and determine the same in a summary manner and shall enter an order according to the fact. Such order of the court shall be conclusive upon all the parties and no appeal therefrom, or writ of error thereto, shall be allowed to review or reverse the same. If upon such hearing the court shall find against the allegations of said certificate, it shall enter an order accordingly, but it shall then be the duty of the said board of local improvements to procure the completion of the said improvement in substantial accordance with the said ordinance, and said board may, from time to time, file additional

or supplemental applications or petitions in respect thereto, until the court shall be eventually satisfied that the allegations of such certificates or petitions are true, and that said improvement is constructed in substantial accordance with the said ordinance. If before the entry of such order upon such certificate there shall have been issued to the contractor in the progress of any such work, any bonds to apply upon the contract price thereof, said contractor or the then owner or holder of such bonds, shall be entitled to receive in lieu thereof new bonds of equivalent amount, dated and issued after the entry of such order. Nothing in this section contained shall be construed to apply or shall apply to any proceedings under sections 57 and 58 of this Act or either of them, for the confirmation of new assessments, levied to pay for the cost of work already done. (As amended by Act approved June 27, 1913. In force July 1, 1913, L. 1913, p. 165.)

SEC. 85, par. 215. During the progress of the work, the Board of Local Improvements has the duty of inspecting it to see that it complies with the ordinance and the contract.

SEC. 86, par. 216. Bonds may be issued to anticipate the collection of the second and succeeding installments provided for by the ordinance.

SECS. 87, 88, pars. 217-218. The improvement may be paid for by bonds which in turn are to be paid out of the special assessment. Bonds can only be issued to the contractor at par with accrued interest.

SEC. 90, par. 222. No person or persons accepting the vouchers or bonds as provided herein shall have any claim or lien upon the city, town or village in any event for the payment of such vouchers or bonds or the interest thereon, except from the collections of the assessment against which said vouchers or bonds are issued, but the municipality shall not, nevertheless, be in any way liable to the holders of said vouchers or bonds in case of failure to collect the same, but shall, with all reasonable diligence, so far as it can legally do so, cause a valid special assessment or assessments, special tax or taxes, as the case may be, to be levied

and collected, to pay said bonds and vouchers, until all bonds and vouchers shall be fully paid. Any holder of vouchers or bonds, or their assigns, shall be entitled to summary relief by way of mandamus or injunction to enforce the provisions hereof.* (As amended by L. 1901, p. 101, approved and in force May 9.)

SEC. 91, par. 223. It is further provided that from time to time as the work progresses, payments may be made to the contractor either in money, vouchers or bonds to apply upon the contract price.

SECS. 95, 96, pars. 227-228. Appeals and writs of error are provided for to the Supreme Court of Illinois.

* By the 1941 revision, the word "hereof" was taken out and the words "of this section" were substituted.

Office - Supreme Court, U. S.
FILED
DEC 4 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 75

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMIR ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

BRIEF OF RESPONDENT, THE MACCABEES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD J. JEFFRIES, JR.
DAVID A. HERSH
Counsel for Respondent.
THE MACCABEES

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I

Statement of the Case

Your respondent respectfully submits that the petitioners statement of the case does not completely and adequately

reflect the case stated by the Bill of Complaint filed by the respondent.

In the first place, the case is here only because, although the trial court itself believed the respondent entitled to relief in some respects (R. 246), was at most in doubt as to the rest of it, the lower court requested the Court of Appeals to tell it whether the respondent would be entitled to all the relief requested before the trial court should proceed to hearing of the issue raised by the Bill (R. 264-6, 268-9).

In the second place, in all the years since 1924 the respondent has been trying to make the petitioners and the other defendants take the steps required of them to make the sewer involved conform to the ordinance and contract, so that the installments of special assessments and the bonds issued to anticipate them, will be collectible (R. 17-19). The petitioners and other defendants on the other hand, have been refusing to take and have confederated together to prevent the taking of those steps while, at the same time insisting that the respondent is entitled to no relief for the sole and only reason that none of those steps have been taken (R. 10-19, 23-24).

Some of the relief sought by the respondent as a holder of some of the special assessment bonds is especially given to the respondent and others similarly situated by statute for the purpose of enabling the bond holders to enforce mandatory obligations imposed by the Local Improvements Act for their benefits. One phase of the relief under the Act is a mandatory injunction compelling the filing of a certificate of cost and completion in the County Court in the county in which the improvement was initiated (R. 19-20). Until such a certificate has been filed and an order entered on it by the County Court, the entire special assessment proceeding stands in status quo with none of the installments of assessments and none of the bonds issued to anticipate them, becoming delinquent. The petitioners and the other defendants are seeking to perpetuate this condition, even though the sewer itself, as the result of secret and unlawful changes made by the petitioners, has been in constant use and rendering service to the locality without cost since 1924 (R. 15).

In the third place, the respondent has pointed out in its Bill of Complaint that the other defendants and the petitioners

confederated together for the purpose of cheating and defrauding the respondent by making secret changes in the sewer consisting of:

(1) Installing pumps so that the sewer which was supposed to be a gravity sewer, but which would not function as such, would function as a force flow sewer (R. 15-16).

(2) Connecting the sewer, as so changed, with the sewer system of the City of Waukegan under an arrangement officially entered into by the two cities for that purpose, instead of connecting the sewer with the sewer system of the City of North Chicago as the ordinance required (R. 12, 14-19, 24, 27, 29).

In the fourth place, a reading of the Bill of Complaint indicates that by the acts of the other defendants and the petitioners, the original sewer as provided by the ordinance was *abandoned* and an entirely different project was set up in its place. The abandonment of the project and the confederation of the petitioners and the other defendants in preventing the efforts of the respondent from requiring the completion of the project as originally designed has prevented the validation of the respondent's bonds *causing not only injury to the respondent in that respect but loss of interest from 1924 to such time that the bonds may be validated and; also loss to the respondent of assessments already collected but unaccounted for by the City of North Chicago (R. 26) and; also damages to the respondent caused by the defendants in bringing this and other proceedings in order to enforce the provisions of the Local Improvements Act to a proper completion of the project as well as punitive damages for the conspiracy against the respondent.*

A review of the pertinent sections of the Local Improvements Act (R. 21, 19, 20, 23, 25) will reveal its total inadequacy to grant respondent full, adequate, and complete relief necessary to make it whole. A reading of the respondent's Bill of Complaint will indicate that not only is it entitled to have its bonds validated but as mentioned in the Statement of the Case hereinbefore set forth, its relief will not be full and complete unless it is given consideration on the other elements of damages to which it is entitled. *The Improvements Act can only go so far as to validate the bonds held by the respondent.*

The respondent submits that the relief thereunder falls far short of affording the respondent a full, complete, and adequate remedy. Even the enforcement of the remedy for validation of the bonds is uncertain. There is no remedy under the Act for accounting of assessments collected nor for damages for loss of interest since 1924 nor for damages for enforcement of relief nor punitive damages for conspiracy against respondent.

A reading of the respondent's bill will indicate that the gist of its complaint is not as the petitioners claim (a mere failure on the part of the City of North Chicago to comply with the Local Improvements Act) but rather the unlawful getting together of the petitioners and other defendants to defeat through fraudulent means the respondent in its property rights.

As appropriately stated in the opinion below:

> "The gravamen of the plaintiff's cause is not the mere existence of an unsatisfied statuatory right; it is the manner of the defendant's disregard of these alleged rights which prompt the plaintiff to seek the aid of a Federal Court of Equity in putting to an end the defendant's alleged conspiracy to cheat and defraud ***."

REPLY TO PETITIONERS' JURISDICTIONAL STATEMENT

Respondent disagrees with the petitioners, that there exists in this case a basis for appeal to this court on the four propositions in petitioners' "Reasons for granting the writ."

On proposition No. 1 in petitioners' "Reasons for granting the writ" respondent denies that a conflict of opinion exists between the lower court in this case and the Circuit Court of Appeals for the Fifth Circuit in the case of Fineran v. Baily 2 Fed. (2nd) 363. That case was merely authority for the proposition *that where nothing else is involved* a district court will decline to issue a mandatory injunction, first because political rather than property rights were involved; second, as stated by the court on page 363, *the appellants had a complete remedy in the State Courts;* and thirdly, there was no provision under the state statutes in that case for mandatory injunction, whereas, in this case under Section 90 of the Local

Improvements Act relief in the form of a mandatory injunction is *specifically provided for the benefit of the bondholders.*

In this case more is involved than a request for mandatory injunction. As hereinafter pointed out, respondent's relief at law in the State Court under the Local Improvements Act is not adequate, is uncertain, does not render complete relief, does not afford relief from fraud and involves property rights as distinguished from purely political matters.

Answering point No. 2 of petitioners' "Reasons for granting the writ" the conclusion drawn by the petitioners that the respondent could obtain equitable relief in the Federal Court not obtainable in the state court is wholly unwarranted. As more particularly pointed out in the respondent's main argument under IIIA (3) herein, your respondent respectively contends that had it filed its bill in the State court in chancery it would have been entitled to all of the relief requested of the Federal court in this case. The respondent, because of diversity, had the right to request relief of the Federal court.

Answering point 3A of petitioners' "Reasons for granting the writ" your respondent submits that the same is fully answered in respondent's main argument under IIIA (3), (4), herein.

Answering point 3B of petitioners' "Reasons for granting the writ" this objection like the other objections raised by the petitioners is premised upon the erroneous assumption that the remedy at law under the Local Improvements Act would afford respondent full and complete relief. That it will not is obvious as more particularly pointed out in the respondent's "Statement of the Case" herein.

Answering point 3C of petitioners' "Reasons for granting the Writ" here again the petitioners assume that the remedy at law in the State court is adequate and complete. That it is not, your petitioners again refer to respondent's "Statement of the Case" wherein the inadequacy of the legal remedy under the local Improvements Act is pointed out.

Petitioners' point 3D is not at all well taken for the reason that the case of Pecheur Lozenge Co., Inc. v. National Candy Company, Inc. decided March 30, 1942 and reported in Volume 86 No. 11 of the Supreme Court Law Edition on page 739, did not involve questions pertaining to rights of bondholders

of Local Improvements bonds. That case involved a question whether the Bill of Complaint stated a cause of action under the copyright law. This court held in that case that the only cause stated was for unfair competition and common law (trade mark infringement) to which this court said local law applies. The decision of the lower court in this case in no way conflicts with the Pecheur decision. The lower court in this case in no way departed from or conflicted with the local law of Illinois. The decision of the lower court in this case fundamentally held that a Federal court of equity would grant relief where the remedy at law was uncertain, incomplete, inadequate, and to relieve from fraud. As pointed out herein—IIIA (3)—If the respondent had filed its Bill of Complaint in the State court in chancery it would have stated a cause for relief in the State court. This being a diversity case, the respondent properly selected the Federal court as it had the right to do for relief.

Point 4A is entirely unwarranted. There is no indication in the decision of the lower court that it based the same on matters not in the record. As a matter of fact the respondent's Bill of Complaint contains ample allegations to sustain the opinion of the lower court. A review of the same herein would serve no purpose but to encumber this brief. Review of the allegations of the Bill contained in the record will fully answer petitioners' point.

Petitioners' point 4B involving the case of Tolman v. Clark County Drainage System 52 Fed 2nd page 226 is not at all in conflict with the decision of the lower court. That case involved the Wisconsin law covering drainage districts. That law is much different in many respects from the Local Improvements Act in this case. Under the decisions of the Wisconsin courts disclosed in that case, involving the construction of the Wisconsin Drain Law the Circuit Court, wherein the drainage district proceedings were pending, was *determined to have full jurisdiction and power to grant all relief in that case.*

That case would only be similar to the case at bar if the County Court in this case had jurisdiction to grant all of the relief sought by respondent in its suit brought in the District court. As pointed out in IIIA (2) herein, the County Court does not have jurisdiction in chancery nor does it have the power to issue a mandatory injunction nor does it have juris-

diction to relieve from fraud or to compel an accounting by a trustee.

III

Summary of Argument for Not Granting Writ of Certiorari

The Circuit Court of Appeals was correct in holding this is a proper case for relief in a Federal Court of Equity because:

A

A Federal Court in equity will grant relief in a proper case where jurisdictional requisites exist and where the remedy in the State Court at law is uncertain, inadequate, incomplete.

B

Granting relief to respondent as prayed for will not work a conflict between the State and Federal Courts.

ARGUMENT

A

The petitioners' request for Writ of Certiorari centers mainly upon the proposition advanced by the petitioners that the respondent has a remedy at law in the State court under the Local Improvements Act and that the respondent should be relegated to that forum for relief and for that reason the Federal court should decline to entertain jurisdiction even though other federal jurisdiction requisites are present. Interwoven in this same question is the petitioner's argument that because of the remedy in the State court, a Federal court should decline to exercise jurisdiction, otherwise there would exist a possible conflict between a State court or Federal court.

The respondent in answering thereto submits that this is not and could not constitutionally be made a matter exclusively for the State court because:

(1) A Federal court in equity has jurisdiction when there is no legal remedy available on the law side of the Federal court, all of the other jurisdictional requisites being present.

(Respondent maintains that there is no legal remedy available to it on the law side of the Federal court.)

In *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378 (see C. C. A. decision in 297 Fed. 710, and Dist. Ct. decision in 282 Fed. 364), the Statutes of the State of South Dakota gave to the injured party a remedy in the State courts just as the defendants contend we have a remedy in the State courts here. All three of the courts hearing that case decided against this contention, the Supreme Court saying:

> "The remedy by appeal to the State court under §8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the Federal courts, and *the test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the State courts. Smyth v. Ames*, 169 U. S. 466; *Chicago, B. & Q. R. R. Co. v. Osborne, supra.*" (Italics ours)
>
> * * * *
>
> "The legal remedy under the state law being uncertain, the Federal Court has jurisdiction in equity to enjoin the assessment. *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288."

It is significant that this case was a suit for injunction to enjoin a drainage assessment in the Board of County Commissioners of one of the counties in South Dakota. The holding is also important here in that it announces as a rule of law that even though the State Statutes give a remedy and such remedy may be adequate, unless there is an adequate remedy on the law side of the Federal court, the Federal court will take jurisdiction in chancery.

The language of the Circuit Court of Appeals in that case (297 Fed. 710, 718) is:

> "A remedy in the State court that cannot be pursued in the Federal court is not an adequate remedy."

Thus, if the petitioners pursue their argument that we have no remedy in the Federal court because we are given one in the State court under the Local Improvements Act in the

County Court, of which we cannot avail ourselves in the Federal court, the argument automatically defeats itself, as in that event we are entitled to the relief in chancery which we are here asking. Within the meaning of the *Risty* case the Federal Court could take jurisdiction of the entire State court matter, the proceeding in the County Court, follow it through, and see that justice is done.

In the *Singer Sewing Machine Co. v. Benedict,* 229 U. S. 481, 486, it was held that the collection of Colorado taxes will not be enjoined by a Federal court where the *state law* gave an adequate remedy *which would be available in the Federal court,* the court saying (p. 486):

> "The Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. *This right was one which could be enforced by an action at law in the Circuit Court, no less than in the State courts, if the elements of federal jurisdiction such as diverse citizenship and the requisite amount in controversy, were present. Ex parte Mc Niel* 13 Wall, 236, 243; *United States Mining Co. v. Lawson,* 134 Fed. Rep. 769, 771." (Italics ours)

In *C. B. & Q. R. Co. v. Osborne,* 265 U. S. 14 a bill to enjoin the collection of state taxes was upheld. The argument was made that the taxpayer had an adequate remedy at law in the State court as an appeal of sorts was allowed from the order fixing tax. The court here said through Mr. Justice Holmes (p. 16):

> "If an action to recover the payment were allowed the suit might be brought in the courts of the United States under the usual conditions as well as in those of the state. (Citing *Singer Sewing Machine Co. v. Benedict,* 229 U. S. 481, 486 discussed above.) But the writ of error can be sued out only in the state, *and a remedy in the State courts only has been held not to be enough.*" (Italics ours)

Justice Holmes cites *Smyth v. Ames,* 169 U. S. 466, 516; *St. L.-S. F. Ry. Co. v. McElvain,* 253 Fed. 123, 136 and *Franklin v. Nevada-California Power Co.,* 264 Fed. 643, 645, all of which hold that Federal courts have jurisdiction in chancery

in spite of the existence of a statutory remedy in the State court, even if the State court remedy is adequate, unless the State court remedy is also open in the Federal court.

(2) A Federal court has jurisdiction where the remedy in the State court is uncertain, all of the other jurisdictional requisites being present.

The respondent maintains that even as to part of the relief it claims to be entitled to, i.e. mandatory injunction to require the Board of Local Improvements to file the certificate of completion in the County Court, there is grave doubt whether the County Court has jurisdiction to issue a writ of injunction or mandamus. In its Bill of Complaint the respondent alleges that the remedy in the State court is uncertain (R. 14, 24) and the County Court refused to assume that it had the power to punish for contempt the failure of the Local Improvements Board to file the certificate of completion (R. 18).

As a matter of fact, in the County Court the city contended that that court had no jurisdiction to issue a writ of mandamus or injunction. The constitution of the State of Illinois of 1870, Section 18, Article 6 entitled "County Courts" provides that they shall be "courts of record" having jurisdiction in probate and apprentice matters "and in proceedings for the collection of taxes and assessments and such other jurisdiction as shall be provided by general law." But there is no delegation of chancery or mandatory powers. The statutory provisions are found in the County Court Act of 1874 as amended (Ill. Rev. St. 1941, Ch. 37, Sec. 171-177 and 282-296) the section regarding jurisdiction in Section 7 (Ill. Rev. St. Ch. 37, Sec. 177) and reads as follows:

> "*Concurrent jurisdiction with Circuit Court in certain cases.* §The County Courts have concurrent jurisdiction with the Circuit Courts in all that class of cases wherein justices of the peace now have or may hereafter have jurisdiction, where the amount claimed or the value of the property in controversy shall not exceed two thousand dollars ($2,000), concurrent jurisdiction in all cases of appeals from justices of the peace and police magistrates and in all criminal offenses and misdemeanors where the punishment is not imprisonment in the penitentiary or death."

In *School Inspectors of Peoria v. The People ex rel. Grove,* 20 Ill. 525, the Supreme Court expressly held that the County Court does not have jurisdiction in mandamus. Certainly the County Court has no jurisdiction in chancery. *McDonough v. Gage,* 357 Ill. 466, 470. For a discussion of the jurisdiction of Illinois County Courts, if this court feels it is pertinent, we refer to the recent cases of *Thayer v. Village of Downers Grove,* 369 Ill. 334, *People v. Harshbarger,* 296 Ill. App. 397 and *Roberts v. Village of Lyon,* 307 Ill. App. 36.

So uncertain is the enforcement of the remedy in the County Court that litigants in other cases have had to petition other courts within the state other than the County Court for relief when mandatory action was required in similar proceedings. For instance, *Price v. Board of Local Improvements,* 266 Ill. 299, the remedy for mandatory action was *exercised in a State court other than the court in which the improvement was pending.*

Citation of authority is unnecessary to the effect that where the remedy at law is uncertain that equity is the proper forum for relief, but apropos that point see *Dawson v. Kentucky Distilleries Company,* 255 U. S. Page 288, where this court said on page 296:

> "If the remedy at law be doubtful a court of equity will not decline cognizance of the suit."

and this court said in *Corporation Counsel of Oklahoma v. Cary,* 296 U. S. 452, 458:

> "An examination of the decisions of the Supreme Court of Oklahoma confirms the conclusions reached by the court below as to the uncertainty with which it was confronted and the consequent lack of effective judicial remedy in the State courts."

This court went on to say on the same page that the District Court did not abuse its discretion in issuing an injunction.

Because of the uncertainty of the jurisdiction of the County Court to grant relief where the local Board refuses to file a certificate of completion, and because the Local Improvements Act contemplates that mandatory relief thereunder may be requested in any court to compel the filing of the certificate, your respondent submits that a Federal Court of Equity is a proper forum for relief in this case.

(3) A state statute cannot reduce the remedial right to proceed in the Federal Courts.

The petitioners lay much stress upon the proposition that granting respondent relief in the Federal court will result in deciding questions of local law in such courts contrary to the decisions of the State courts. The petitioners on this point erroneously regard the respondent's remedy for what they claim are the respondent's substantive rights. That the states cannot limit the remedies afforded in Federal Courts of Equity is settled beyond question as stated in *Guffy v. Smith*, 237 U. S. Page 101, 114:

> "By legislation of Congress and repeated decisions of this court, it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws and rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting."

Nor will granting relief to respondent by the Federal court have the effect of creating a conflict between the State of Illinois and its courts and the Federal courts. The respondent believes that had it made application for relief to an Illinois State court sitting in equity on the basis of its Bill of Complaint in this cause, that it would have been entitled to the relief prayer for. The respondent elected, as it had the right to, because of diversity of citizenship and amount in controversy being over three thousand dollars, to apply for relief in the Federal District Court rather than a court of equity in the State of Illinois. The petitioners do not maintain that on the basis of the relief requested by the respondent it would have no right to apply for relief in a court of equity in the State court. Therefore, does it not follow that as the respondent has the right to apply to a State court sitting in equity that it would also be entitled to apply for relief in a Federal court in equity if the jurisdictional requisites are present.

(4) A Federal court in equity has jurisdiction when the remedy in the State court at law is incomplete, inadequate, and does not render full relief.

Respondent maintains that not only is such remedy as it may have in the County Court at law uncertain, as hereinbefore pointed out, but even if that remedy were certain, it would not afford the respondent full, complete and adequate relief. Validation of its bonds is only part of the relief the respondent claims to be entitled to. Accounting for assessments collected by the City of North Chicago is another phase of the relief respondent claims to be entitled to. Damages for loss of interest to the respondent from 1924 until such time as the respondent's bonds may be validated is another part of the relief respondent claims to be entitled to and damages for the conspiracy against the respondent is another part of the relief that respondent maintains should be granted. Obviously, the Local Improvements Act does not afford such remedy nor has the County Court the jurisdiction to entertain such request for relief. As stated in the case of *Tyler v. Savage*, 143 U. S. 79, 95:

> "Under Section 723 of the revised statutes, the remedy at law, in order to exclude equity, must be practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

B

Petitioners lay stress upon the proposition that a Federal court in equity should not interfere in this case because to do so would be to disregard the rightful independence of the State courts in carrying out their own domestic policies. The petitioners for their authority cite:

> *Penn General Casualty Co. v. Pennsylvania*, 294 U. S. 189, 197;
>
> *Railroad Commission v. Pullman Company*, 312 U. S. 496;
>
> *Kelleam v. Maryland Casualty Company*, 312 U. S. 377

as well as other cases along this same line.

Under this line of authority it should be noted that this court held that a Federal District Court should decline jurisdiction *because there was an adequate remedy within the state agency court or body.*

For instance, the case of *Penn General Casualty Company v. Pennsylvania,* 294 U. S. 189, involved the dispute between the jurisdiction of the State and Federal District Courts and the Insurance Commissioner of Pennsylvania over the liquidation of the business of the Pennsylvania General Casualty Company an insolvent Pennsylvania insurance corporation.

In that case a Bill of Complaint was pending against the company in the District Court for Eastern Pennsylvania, the Attorney-General of the State of Pennsylvania, acting pursuant to Section 502 of the Insurance Department Act, filed a suggestion in the State court alleging that the company was in a financially unsound condition and prayed for an order permitting the assets of the company to be taken into possession of the Insurance Commissioner for liquidation. This court in that case stated (p. 197):

> "Although the District Court has thus acquired jurisdiction, the end sought by the litigation in the State court is the liquidation of a domestic insurance company by a state officer. *In the absence of a showing that the interests of creditors and shareholders would not be adequately protected by this procedure, the case was a proper one for the District Court, in the exercise of judicial discretion to relinquish the jurisdiction in favor of the administration by the state officer.*" (Italics ours.)

The aforementioned case is of further interest in the following respect in which the court said:

> "Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a State court and a Federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res judicata in the other. See Buck v. Colbath, supra (3 Wall 342, 18 L. Ed. 260): Kline v. Burke Construction Company, 260 U. S. 266, 67 L. Ed. 226, 43 S. Ct. 79, 24 R. L. R. 1077, and cases cited at pages 230, 231. But if the two suits are in rem or quasi in rem, requiring that the court or its officer have possession or control of the

> property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system * * *"

From the foregoing it would seem that there would be no conflict in that respect in this case between the State and Federal courts because the subject matter of the respondent's complaint is in personam rather than in rem.

In *Kelleam v. Maryland Casualty Company*, 312 U. S. 377, the Federal District Court appointed a receiver over certain property involved in an estate proceeding pending in the State court. This court in dismissing the bill filed by the Maryland Casualty Company said (page 381):

> "* * * Furthermore, from all that appears, the surety (Maryland Casualty Company) could be adequately protected in the cause pending in the Oklahoma court by provisional remedies or otherwise."

The case of *Railroad Commission of Texas v. Pullman Company*, 312 U. S. 496, is further indicative that where there is adequate remedy within the state body, a Federal court will decline to assume jurisdiction in order to prevent conflict between the Federal and State courts. This court in its opinion in that case said (page 501):

> "The law of Texas appears to furnish easy and ample means for determining the commission's authority * * *. In the absence of any showing that these obvious methods for securing a definitive ruling in the State courts cannot be pursued with full protection of the constitutional claim, the District Court should exercise its wise discretion by staying its hands * * *."

In any event there will be no interference between the County Court in which the assessment proceeding is pending and the Federal District Court. If that part of the relief requiring the Board of Local Improvements to file the certificate of completion with the County Court is granted, the

County Court can then proceed to a hearing leading to ultimate validation of its bonds.

* * * *

It is, therefore, submitted that this case is not a proper one for review by certiorari in this court and that the petition for writ of certiorai should be denied.

Respectfully submitted,

EDWARD J. JEFFRIES, JR.
DAVID A. HERSH,
Counsel for Respondent
THE MACCABEES.

(21)

Office - Supreme Court, U. S.
MAY 23 1942
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. [redacted] 75

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMER ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

REPLY OF PETITIONERS, CITY OF NORTH CHICAGO, ET AL., TO OPPOSING BRIEF OF RESPONDENT, THE MACCABEES.

HAROLD J. TALLETT,
City Attorney of the City of North Chicago, Illinois,
FRANK T. O'BRIEN,
LIONEL A. MINCER,
Chicago, Illinois,
Counsel for Petitioners.

WHAM AND O'BRIEN,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1140.

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMER ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

REPLY OF PETITIONERS, CITY OF NORTH CHICAGO, ET AL., TO OPPOSING BRIEF OF RESPONDENT, THE MACCABEES.

MAY IT PLEASE THE COURT:

On May 13, 1942, the respondent The Maccabees, filed herein a printed document of fifty-one pages, entitled as a Reply in the above numbered cause, and also as a petition on behalf of The Maccabees for a writ of certiorari and various procedural motions, all filed in a separate proceeding. Although constituting, according to its caption, a petition and four motions (one in the alternative),

in the separate proceeding as well as a Reply in No. 1140, this document is not so separated into its parts as to enable the undersigned counsel for the petitioners to determine specifically what parts are intended as an opposing brief in this case, and what parts are not so intended.

We believe that the portions of the document filed May 13, 1942, which are addressed to the question whether or not a writ of certiorari should issue in this case, are pages 27 to 33, inclusive, thereof. If there be arguments on other pages addressed specifically to the granting or refusal of the writ, we have not noticed them, and we submit as an excuse for our failure to segregate them, the fact that they are so interwoven with other portions of the document as to be inextricable.

Under the following points numbered I to V, we will endeavor to answer such parts of the above-described document as seem to constitute an opposing brief in this case under Rule 38(3) of this Court. We are not at this time filing an opposing brief nor taking any other steps in the separate proceeding.

I.

Petitioners and their counsel deny, with all of the emphasis possible on a printed page, the repeated assertions of respondent's counsel that they have committed frauds, conspiracies or tricks, and with equal emphasis deny his charges of improper motives or purposes in filing the petition for certiorari herein. The violent, vicious and libelous attacks upon the counsel for petitioners, made in the document filed May 13, 1942, are typical of the tactics which respondent's counsel has adopted and used in earlier stages of this litigation.

II.

At page 27 of the document filed May 13, 1942, it is charged that the order sought to be reviewed herein is not a final order. Of course it is not a final decree in the sense of an adjudication terminating the litigation between the parties. On the other hand, it is a final order so far as the Circuit Court of Appeals is concerned, since it has terminated the litigation in that Court. The propriety of allowing certiorari to review a judgment reversing and remanding a case is sustained by *Forsyth* v. *Hammond*, 166 U. S. 506, 511-513, and *Gay* v. *Ruff*, 292 U. S. 25, 30, and the cases there cited. These authorities show that this Court not only can, but frequently does allow certiorari in cases where the pleadings have reached the stage of those in the present case.

III.

On pages 29, 30 and 32, it is asserted that in the petition for certiorari we have misstated the Illinois law with respect to the availability of the remedy of mandatory injunction in a special assessment case. We deny that any misstatement was made. Respondent relies exclusively on the last sentence of Section 90 of the Illinois Local Improvements Act (quoted in the Petition herein, Appendix, page 29), and ignores the Illinois Supreme Court decisions cited in the petition: *Conway* v. *City of Chicago*, 237 Ill. 128, 135; *White* v. *City of Ottawa*, 318 Ill. 463, 473, and *Des Plaines Foundry Co.* v. *City of Des Plaines*, 335 Ill. 213, 216. Respondent cites no cases to the contrary, and the statute relied on was in force when the cases above cited were decided. It is apparent that Section 90 of the statute cannot have the all-inclusive effect ascribed to it by respondent. The Supreme Court of Illinois has held in the *Ottawa* and *Des Plaines* cases above cited that the

Local Improvements Act has abolished by implication the jurisdiction of equity in local improvement matters. We submit that our statement of Illinois law is correct, and that a State court could not, under the Illinois law, grant a mandatory injunction on a bill in equity like the one filed here.

IV.

At page 30, the respondent criticizes our citation of *Fineran* v. *Bailey*, 2 Fed. (2d) 363, and attempts to distinguish it by contrasting the applicable statutory provisions. We reply that the case was correctly cited. and that it holds that a Federal Court, in a case in which mandamus is the proper remedy, cannot grant a mandatory injunction to accomplish the same result which might have been accomplished in the State courts by mandamus. *Fineran* v. *Bailey* involved a contested nomination for public office. A Louisiana statute, Section 55 of Act No. 130 of 1916 (Dart's Louisiana General Statutes, 1932, Title XIX, Chapter 7, Section 2762) provided that there should be created a contest board composed of the secretary of state, the state auditor, the state treasurer and two electors named by the governor, which had authority to pass on objections to the regularity of nominating petitions. Thus, the plaintiff in *Fineran* v. *Bailey* was specifically given by law of Louisiana a non-judicial tribunal to which he might present his complaint; but the emphasis in the opinion of the Circuit Court of Appeals for the Fifth Circuit was not upon the failure of the plaintiff to resort to that tribunal. The ground of the decision was that the plaintiff could and should have obtained a writ of mandamus in the State courts.

V.

At page 33, counsel for the respondent criticizes the synopsis of the Illinois Local Improvements Act printed as an appendix to the petition herein. In reply, we point out first that the appendix only purported to be a synopsis and not a verbatim copy of the Act, except in the case of Sections 84 and 90, which are quoted in full; and second, that Section 73 referred to specifically on page 33 of the document filed May 13, 1942, deals exclusively with remedies given to a construction contractor. Section 90, dealing with the remedies of bondholders, is quoted in full.

We respectfully submit that the right of the petitioners to a writ of certiorari in this case is sustained by the recent decision of this Court in *Chicago* v. *Fieldcrest Dairies, Inc.*, ... U. S. ....., 86 L. Ed. Adv. Ops., 888, 890, decided April 27, 1942. The opinion of the Court in that case supports the propriety of the action of the late Judge Woodward, United States District Judge, in denying relief to the plaintiff below.

The writ of certiorari should be issued pursuant to the prayer of the petition herein.

Respectfully submitted,

HAROLD J. TALLETT,
City Attorney of the City of North Chicago, Illinois,
FRANK T. O'BRIEN,
LIONEL A. MINCER,
Chicago, Illinois,
Counsel for Petitioners.

WHAM AND O'BRIEN,
Of Counsel.

Office - Supreme Court, U. S.
FILED
DEC 21 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 75

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMER ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

REPLY OF PETITIONERS, CITY OF NORTH CHICAGO, ET AL., TO THE SECOND OPPOSING BRIEF OF RESPONDENT, THE MACCABEES.

HAROLD J. TALLETT,
City Attorney of the City of North Chicago, Illinois,
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WHAM AND O'BRIEN,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 75.

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMER ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

REPLY OF PETITIONERS, CITY OF NORTH CHICAGO, ET AL., TO THE SECOND OPPOSING BRIEF OF RESPONDENT, THE MACCABEES.

MAY IT PLEASE THE COURT:

The petitioners* have heretofore filed a reply to the first opposing brief of The Maccabees. That brief has been withdrawn. We respectfully request the Court, however, to consider the applicable authorities and argument in our previous reply as well as those herein contained.

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* The City of North Chicago, Illinois, and its present officials none of whom held office at the time of the construction of the sewer for which the special assessment was spread.

I.

The principal question presented by the petition herein is whether a Federal court should grant mandatory relief in equity involving coercion of an Illinois municipality and its officials in a case where the Illinois law would not have sanctioned equitable relief by injunction. This question has not been answered by the respondent, in fact it seems to have been studiously avoided, yet if the decision of the Court of Appeals stands it is an adjudication that the Federal court can and must grant such relief in a proper case, the Illinois decisions to the contrary notwithstanding.

The respondent insists at page 12 and elsewhere in its brief, "that had it made application for relief to an Illinois state court sitting in equity on the basis of its Bill of Complaint in this cause, it would have been entitled to the relief prayer for." The Illinois law is otherwise. In *White* v. *City of Ottawa*, 318 Ill. 463, which was a suit in equity, that court said at page 466:

> "The *material question* presented for decision is *whether a court of equity has jurisdiction to grant relief where the improvement is not being constructed in compliance with the contract and ordinance* but is of materially less value and durability than the improvement required by the ordinance, which the contractor agreed to construct." (Italics ours.)

and held at page 472, 3:

> "By the amendment the legislature has clearly conferred special jurisdiction on the court in which the assessment was confirmed, and it has as clearly expressed its intention that said court shall have sole jurisdiction of the questions involved in this appeal. That is sufficient, in addition to what has already been here said, for this court's holding that *the jurisdiction of the circuit court heretofore entertained by injunction is abolished by said amendment by implication, and we accordingly so hold.*" (Italics ours.)

To the same effect is *DesPlaines Foundry Co.* v. *City of DesPlaines,* 335 Ill. 213, 216.

Respondent's petition is still pending in the County Court of Lake County (R. 17). It has never sought the writ of mandamus available to it, if warranted by the facts of the case under the decisions of the Supreme Court of Illinois in *Conway* v. *City of Chicago,* 237 Ill. 128, 135; *Price* v. *Board of Local Improvements,* 266 Ill. 299, and many other cases.

II.

Respondent realizing therefore that the principal question must be answered in the negative endeavors to escape this answer by relying on two secondary points, both unsound. First it says the action is not one for mandatory relief *only,* but for such relief *plus* compensatory damages, and second, that there is no adequate remedy under the State law.

III.

As to the first point we will not enter again upon a lengthy discussion of the theory of the Bill, having analyzed it in detail in our petition. We do observe, however, that the *specific* relief sought against *these petitioners* is a mandatory injunction, and an accounting. The Illinois decisions above cited preclude relief by injunction, and the accounting phase of the Bill involves less than $1,700 (R. 26). The only relief available as to these petitioners therefore is mandamus, and the respondent seems to argue that since the County court has no jurisdiction to grant the writ of mandamus (pp. 10 and 11 of its brief) it follows that the Federal court should have the right to do so. This argument ignores the obvious remedy by mandamus available to the respondent in the State court of general jurisdiction, namely the Circuit court (see *Conway* and *Price* cases above). Furthermore, it ignores

the many decisions of this Court holding that Federal courts have no general power of mandamus.

In *Covington Bridge Co.* v. *Hager,* 203 U. S. 109, 110, this Court said:

> "We are of the opinion that the court below had no jurisdiction of this action. It has been too frequently decided in this court to require the citation of cases that the Circuit Courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process."

See also *Knapp* v. *Lake Shore Ry. Co.,* 197 U. S. 536; *Rosenbaum* v. *Bauer,* 120 U. S. 450, and Hughes Federal Practice (1931), Vol. 1, sec. 268.

Under these authorities the District Court in the case at bar having no jurisdiction to award mandamus, quite properly refused to consider the propriety of an injunction whereby it might accomplish by indirection that which it was without power to do directly.

IV.

As to the second point the Illinois law is neither uncertain nor incomplete as shown above,* but the proper forum for its application is the Illinois court, not the Federal court, despite the diversity of citizenship. On at least two recent occasions this Court has expressed itself as to the propriety of the exercise of Federal jurisdiction where remedies were available to non-resident litigants under the State law. The cases are *City of Chicago* v. *Fieldcrest Dairies,* 316 U. S. ....., 86 Law. Ed. 888, and *Brillhart* v. *Excess Insurance Co.,* 316 U. S. ....., 86 Law. Ed. 1136, decided in April and June of this year.

* For example see the conclusion of the court in the *Des Plaines* case 335 Ill. 213, 216.

In the first case after speaking of the "sound discretion which guides the determination of courts of equity" the Court held at page 890:

> "In this case that discretion calls for a remission of the parties to the state courts which alone can give a definitive answer to the major questions posed. Plainly they constitute the more appropriate forum for the trial of those issues. See 54 Harvard L. Review 1379. Considerations of delay, inconvenience, and cost to the parties which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole."

In the second case in which it appeared that the Missouri law was doubtful, (certainly not apparent in the case at bar) this Court concluded that it was not its function to find its way through a maze of local statutes and decisions on so technical a subject as the scope of a garnishment proceeding, holding at page 1140:

> "We are not concerned here with the burden of proof in establishing facts as to which only the parties to a private litigation are interested. We are concerned rather with the duty of the federal courts to determine legal issues governing the proper exercise of their jurisdiction."

The problems arising in the spreading and confirmation of a special assessment proceeding in Illinois are purely local. They can be properly solved only in the Illinois courts. The suggestion made by the respondent at page 9 of its brief that the District court "could take jurisdiction of the entire state court matter, the proceeding in the County court, follow it through, and see that justice is done" files squarely in the face of the conclusions so recently reached by this Court in the cases above cited. These problems which, of course, must be met by the District court, in the event of the exercise of jurisdiction by

it, were perfectly apparent to the late Judge Woodward, who heard the case in that court and who observed during the argument (R. 246):

> "You want this court to take charge of the further procedure in the special assessment proceedings. I would have great hesitancy in doing that."

The District Judge obviously had a keen and "scrupulous regard for the rightful independence of the State governments." He dismissed the Bill, quite properly declining to take coercive action against an Illinois municipal corporation and its officials. To do otherwise would have been to embark upon litigation, replete with the possibility of hostility between himself and the Judge of the County Court of Lake County.

V.

We insist therefore, that the only cause of action properly alleged against these petitioners was that which sought to compel the filing of a certificate of cost and completion in the County court, and the question was whether or not the Federal equity court was competent to exert the desired coercion through the medium of a mandatory injunction. The right claimed was one created by State law but not enforceable in an Illinois equity court. It is elementary that parties have no right of access to Federal equity courts unless their matter is one of an equitable nature and there is certainly nothing about the respondent's substantive right which is inherently equitable in character. Coercion of public officials to perform their public duties is not one of the recognized heads of equity jurisdiction. The State statute had nothing to do with general principles of equity, nor with Federal equity jurisdiction and since the State equity court could not grant relief the same disability attached to the Federal court.

We conclude that the writ of certiorari should issue as

prayed. The decision of the Court of Appeals below is in direct conflict with that of *Fineran* v. *Bailey,* 2 Fed. (2nd) 363 in the Fifth Circuit and is clearly opposed to the most recent pronouncements of this Court in the *Fieldcrest* and *Brillhart* cases.

Respectfully submitted,

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